

CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD  
SAN FRANCISCO BAY REGION

**ORDER NO. R2-2008-0084**

**ADMINISTRATIVE CIVIL LIABILITY FOR:**

**DR. COLLIN MBANUGO, Owner  
THE LEONA HEIGHTS SULFUR MINE  
OAKLAND, ALAMEDA COUNTY**

The California Regional Water Quality Control Board, San Francisco Bay Region (hereinafter the "Water Board"), finds with respect to Dr. Collin Mbanugo (hereinafter the "Discharger") that:

1. Dr. Mbanugo is the current owner of the Leona Heights Sulfur Mine, a two-acre abandoned mining site located in the Oakland Hills near the junction of Interstate 580 and State Highway 13 (hereinafter the "Site").
2. Water quality at the site is impacted by acid mine runoff, which discharges into a creek that flows through waste rock piles left behind when the mine was abandoned in the late 1920s. Flows passing through the site follow a natural drainage channel of several hundred feet and then enter a storm drain. The storm drain discharges to Lake Aliso on the Mills College Campus, and ultimately discharges to San Leandro Bay via another storm drain system.
3. Site remediation was required initially under Cleanup and Abatement Order No. 98-004, which this Board adopted on January 30, 1998. The Discharger purchased the property on November 29, 2001. The Board amended the 1998 Order on April 14, 2003 by adopting Order No. R2-2003-0028 (hereafter the "CAO"), which identified Dr. Mbanugo as the current owner and added him to the list of dischargers of the Site.
4. On December 16, 2005, the Executive Officer sent a letter to the Discharger pursuant to Water Code Section 13267. The letter approved a revised scope of work and schedule that had been proposed by the Discharger in a work plan submitted pursuant to the CAO on October 28, 2005. The letter required the Discharger to submit monthly progress reports documenting work completed on the project. The progress reports were to be submitted by the last day of each month, beginning in December 2005. Submittal of progress reports was to continue until the Discharger had fully complied with the requirements of the CAO.
5. The Section 13267 letter approved a revised implementation schedule, but required the submittal of monthly progress reports because the Discharger previously had not been diligent in completing tasks required for compliance with

the CAO. Prior work had been intermittent with a history of missed deadlines, resulting in the issuance of a Notice of Violation from Water Board staff on October 6, 2005. The progress reports were required as a means to substantiate the Discharger's compliance with the CAO.

6. The Discharger has not complied with the December 16, 2005 letter because he stopped submitting the required monthly progress reports. Furthermore, the Discharger has not completed project tasks according to the schedule that was approved in the letter. Monthly progress reports were received from the Discharger in January, February, April, May, September, October, and November of 2006, and in February and May of 2007. No further reports have been received since May 2007.
7. Two additional Notices of Violation were issued to the Discharger on March 10, 2006 and July 17, 2006, in an attempt to gain compliance with the December 16, 2005 letter.
8. On July 9, 2008, the Assistant Executive Officer issued an Administrative Civil Liability Complaint in the amount of \$200,000 for the Discharger's failure to submit monthly progress reports required in the Section 13267 letter issued December 16, 2005. For violating CWC Section 13267, the Water Board may administratively impose civil liability pursuant to CWC Section 13268(a)(1) and (b)(1) in an amount which shall not exceed one thousand dollars (\$1,000) for each day in which the violation occurs.
9. The maximum civil liability that could be imposed for this matter is calculated based on the number of days the required technical reports are overdue. For all of the reports missing as of the date the Administrative Civil Liability Complaint was issued (June 10, 2008) there are 2,508 days of violation. (The report due on May 31, 2007 is 376 days late; the report due on June 30, 2007 is 346 days late; the report due on July 31, 2007 is 315 days late; the report due on August 31, 2007 is 284 days late; the report due on September 30, 2007 is 254 days late; the report due on October 31, 2007 is 223 days late; the report due on November 30, 2007 is 193 days late; the report due on December 31, 2007 is 162 days late; the report due on January 31, 2008 is 131 days late; the report due on February 29, 2008 is 102 days late; the report due on March 31, 2008 is 71 days late; the report due on April 30, 2008 is 41 days late; and the report due on May 31, 2008 is 10 days late.) Since the ACL Complaint was issued, there have been an additional 92 days of violation for each of these 13 late reports (1,196 days of violation). The Discharger has also failed to submit the report due on June 30, 2008, which is now 72 days late and for July 31, which is now 41 days late. Accordingly, there are a total of 3,817 days of late report violations, for which the Water Board could assess a total liability of \$3,817,000.
10. On July 9, 2008, the Assistant Executive Officer proposed that civil liability should be imposed on the Discharger in the amount of \$200,000 for the violations

11. The Water Board, after hearing all testimony and reviewing the exhibits and information in the record, determined the Discharger is subject to civil penalties. In determining the amount of civil liability to be assessed to the Discharger under CWC Section 13268, the Water Board has taken into consideration the factors described in CWC Section 13327.
12. With respect to the factors the Water Board has taken into consideration under CWC Section 13327, it finds as follows:
  - a. Nature, Circumstances, Extent and Gravity of the Violations:  
Compliance with the December 16, 2005 request for technical reports under CWC Section 13267 is necessary so that Water Board staff can monitor the Discharger's progress and efforts toward compliance with the CAO. Failure to provide those reports deprives the Water Board of information related to the Discharger's progress in complying with the CAO. The progress reports are an integral part of the CAO compliance. Failure to submit the reports is reflective of the Discharger's failure to comply with the scope of work and schedule approved in the December 16, 2005 letter. The failure to comply with the approved scope of work has allowed an ongoing discharge of low pH water contaminated with metals into waters of the State to continue unabated. Because the reporting violations deprived the Water Board of the opportunity to monitor the Discharger's progress towards protecting water quality, the nature, circumstances, extent and gravity of the reporting violations in this instance are very serious, and the Water Board's analysis of this factor weighs in favor of assessing a substantial penalty.
  - b. Susceptibility of the Discharge to Cleanup:  
The discharges from the mine can be cleaned up by means of implementation of a corrective action plan submitted by the Discharger, which was approved by Water Board staff on July 5, 2006. However, because this ACL Complaint seeks penalties for failure to submit reports under CWC 13267, this factor is not applicable to the Water Board's analysis of an appropriate penalty amount for this violation, except to the extent the failure to submit reports has deprived the Water Board of its opportunities to protect water quality, as discussed under Subdivision a, above.
  - c. Degree of Toxicity of the Discharge:  
The waste rock at the site contains elevated concentrations of sulfur and metals such as iron, lead, copper, and arsenic. The waste rock piles are more

porous than the native bedrock. This allows water to migrate easily through the material. Contact between water and the sulfur-rich waste rock, primarily during the rainy season, causes sulfur to be dissolved, promoting the formation of sulfuric acid within the waste rock piles. Discharge of acidic water from the waste rock pile, known as acid mine runoff, is indicated at the site by the characteristic yellow coloration in the streambed. Creek sampling has shown very acidic conditions in the creek, with the pH at time dropping below 3. The low pH, in turn, increases the solubility of metals present in the waste rock, resulting in high metals concentrations in the creek. Water quality in the creek is impacted visually and chemically for a considerable distance downstream from the site. This water is toxic to aquatic species living in the creek at the site and downstream of the discharge. Beneficial uses of the creek and other water bodies downstream from the site are seriously compromised as a direct result of the discharge. However, because this ACL Complaint seeks penalties for failure to submit reports under CWC 13267, this factor is not applicable to the Water Board's analysis of an appropriate penalty amount for this violation, except to the extent the failure to submit reports has deprived the Water Board of opportunities to protect water quality from toxic discharges, as discussed under subdivision a, above.

d. Ability to Pay and Ability to Continue in Business:

The Discharger owns a number of properties located in Oakland and Emeryville. Although some of the properties are undeveloped, they are zoned for residential development. The assessed value of those properties (which may not reflect their market value, which is likely higher) is in excess of \$1.5 million. The property owner has not provided any evidence of inability to pay. The Water Board's analysis of this factor does not indicate that there should be a reduction in the proposed penalty.

e. Voluntary Cleanup Efforts Undertaken:

The discharger has not voluntarily undertaken cleanup activities. The Discharger is required under the CAO to implement corrective actions. The Water Board's analysis of the factor does not indicate that there should be a reduction in the proposed penalty.

f. Prior History of Violations:

Water Board staff has issued three Notices of Violation ("NOV") to the Discharger in an attempt to gain compliance with the December 16, 2005 letter and the CAO. These NOV letters were issued on October 6, 2005; March 10, 2006; and July 17, 2006. The Water Board's analysis of this factor supports imposition of a substantial penalty because of the need for progressive enforcement, as outlined in the State Water Resources Control Board's February 2002, Water Quality Enforcement Policy.

g. Degree of Culpability:

The Discharger is solely responsible for submission of monthly progress reports to demonstrate compliance with the 13267 letter and the CAO. The Discharger has not submitted a progress report since May 2007 despite numerous requests by Water Board staff that he comply, and despite his written representation that he would do so. The Water Board's analysis of this factor supports imposition of a substantial penalty.

h. Economic Savings:

The Discharger has achieved modest economic savings by not preparing and submitting the technical reports required under CWC Section 13267. The Discharger has achieved significantly greater economic savings by not performing the corrective actions required to comply with the Section 13267 letter and the CAO. The Water Board's analysis of this factor supports the imposition of a substantial penalty.

i. Other Matters As Justice May Require:

The Discharger's property is a significant source of pollutants to the environment. The toxicity of the pollutants emanating from the property has impacted beneficial uses downstream, including the inability to sustain aquatic life. Although he initially demonstrated cooperation after purchasing the property, the Discharger has terminated efforts to obtain necessary permits and has cut off communication with the Water Board staff by failing to submit the required reports. The Discharger has not implemented any corrective actions to comply with the CAO for more than four years or to comply with the December 16, 2005 letter requiring progress reports for more than a year. The Discharger's willful refusal to comply with the Water Board's duly-issued CAO and reporting requirements continues to allow the prolonged discharge of harmful and toxic material into the environment. The Water Board's analysis of the factor supports the imposition of a substantial penalty.

13. A \$200,000 civil penalty is appropriate based on the specific findings made in Finding No. 12.
14. This action is an Order to enforce the laws and regulations administered by the Water Board. Issuance of this Order is exempt from the provisions of the California Environmental Quality Act (Public Resources Code, sections 21000 et seq.), in accordance with Section 15321(a)(2), Title 14, of the California Code of Regulations.
15. The Discharger may petition the State Board to review this Action. The State Board must receive the petition within 30 days of the date this order was adopted by the Water Board. The petition will be limited to raising only the substantive issues or objections that were raised before the Water Board at the public hearing or in a timely submitted written correspondence delivered to the Water Board.

IT IS HEREBY ORDERED that Dr. Colin Mbanugo is civilly liable for the violations of the 13267 Order set forth in detail above, and shall pay the administrative civil liability in the amount of \$200,000. The liability shall be paid to the State Water Pollution Cleanup and Abatement Account within 30 days of the date of this Order.

I, Bruce H. Wolfe, Executive Officer, do hereby certify that the foregoing is a full, complete, and correct copy of an Order adopted by the California Regional Water Quality Control Board, San Francisco Bay Region, on September 10, 2008.

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Bruce H. Wolfe  
Executive Officer